No. 21979

United States Court of Appeals for the Ninth Circuit

- - - - -

Reuben G. Lenske,

Appellant

v.

F. M. Sercombe, Clerk of the Supreme Court of the State of Oregon; John H. Holloway, Secretary of Oregon State Bar; Lamar Tooze Jr., Attorney for Oregon State Bar; Wm. M. McAllister, Chief Justice, William C. Perry, Gordon Sloan, Kenneth J. O'Connell, Alfred T. Goodwin, Arno H. Denecke, Ralph M. Holman, Associate Justices, who comprise the Supreme Court of the State of Oregon; James G. Richmond, Philip Hayter, Carrell F. Bradley, John B. Fenner, Alfred F. Cunha, Wendell E. Gronso, Roy Kilpatrick, Herbert C. Hardy, John D. Ryan, Philip A. Levin, John E. Jaqua and Wallace A. Johansen, who comprise the Board of Governors of Oregon State Bar,

Appellees

****

BRIEF OF APPELLANT

****

Appeal from the United States District Court for the District of Oregon

Hon. John F. Kilkenny

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Reuben G. Lenske
1014 S.W. 2d Ave.,
Portland, Ore. 97204.
Appellant.

SUBJECT INDEX

APPENDIX

TABLE OF AUTHORITIES

JURISDICTION

The District Court had jurisdiction under Title 28 U.S.C. 1343(3) and this court has jurisdiction of the appeal under Title 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellant was convicted of indirect contempt in an original proceeding by the Supreme Court of the State of Oregon. See State et al v. Lenske, 243 Or. 477, 405 P. 2d 510, 407 P. 2d 250. He was fined $500 in the face of a statute of Oregon that limited the punishment for indirect contempt to $100. He filed Suit in U. S. District Court to restrain the enforcement of the State Court judgment alleging in his complaint that the order suspending him from practicing law, upon which the contempt order was based, was entered ex parte and without any notice of any kind and without a hearing of any kind and was therefore violative of his constitutional rights under the Fifth and Fourteenth amendments to the U. S. constitution. See paragraph V of the complaint in the appendix herein.

Appellant alleged that in being held guilty of contempt the court denied him the freedom of speech guaranteed him by the First Amendment to the U. S. constitution. See paragraph VIII of the complaint.

Appellant alleged that he was denied due process guaranteed by the Fifth and Fourteenth Amendments to the U. S. constitution in that the hearing was held before a prejudiced Referee and prejudiced judges, the prejudice having been shown in the manner generally accepted by the courts of the State of Oregon; in that there was a total absence of evidence of the suspension order itself or service

of intent or wilfulness; in that the suspension order, although not introduced in evidence, was void for the additional reason that there was no time limit to the order; in that appellant was denied the right to present argument before the court or a brief relating to the findings of the Referee; in that appellant was denied confrontation by the court at the trial or the hearing when evidence was adduced or at the time of sentencing; in that the court on its own motion permitted an amending affidavit to be filed in the nature of an indictment after the court itself found the initial affidavit to be insufficient; in that the court permitted discovery proceedings against appellant in a quasi-criminal trial. See paragraph IX of complaint in the appendix herein.

Appellant alleged in the complaint that the court denied him the rights guaranteed him by the Sixth Amendment to the U. S constitution in that it denied him a jury trial and in that it conducted the trial in a County and District other than where the crime was alleged to have been committed. See paragraphs X and XI of the complaint.

Appellant alleged that the assessment of a fine greater than that allowed by statute constituted a judicial Bill of Attainder and ex post facto law. See paragraph XII of the complaint.

Appellant alleged that he was threatened with imprisonment under a judgment entered in violation of the U. S. Constitution and that the courts of Oregon were prejudiced against him and that he had exhausted the procedural remedies afforded him by the State of Oregon. See paragraph XIII of the complaint. Besides being an appendix in this brief the complaint also appears on pages 1-4 of the Clerk's Record herein.

SPECIFICATION OF ERROR I.

The trial court erred in granting summary judgment and in dismissing my suit.

a. The court erred in holding that paragraph V of my complaint (R 2) failed to allege a sufficient set of facts to show violation of that part of the Fourteenth Amendment to the U. S. Constitution which says:

> "nor shall any State deprive any person of life, liberty, or property without due process of law;"

Suspending a lawyer ex parte without notice and without a hearing is depriving a person of property without due process.

b. To deny a citizen the right to make a legitimate inquiry of a state employee is a violation of the First Amendment to the U. S. constitution, which says:

> "Congress shall make no law ...abridging the freedom of speech."

This applies to states in the Fourteenth Amendment:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Paragraph VIII (R 3) of my complaint is a sufficient allegation of my being deprived of that right.

c. Requiring a litigant to be tried by a prejudiced court, allowing discovery proceedings against him in a quasi-criminal proceeding, failing to adduce evidence of intent or wilfulness, denying a defendant to present argument or briefs, permitting the amendment of an affidavit in the nature of an indictment many months after it was held sufficient, refusal of the court to confront a defendant in a criminal prosecution at trial or at sentencing, failure to adduce evidence of a suspension order, the violation of which is the basis for criminal prosecution for contempt, severally and collectively constitute a violation of due

process protected by the Fourteenth Amendment above quoted. The allegations in paragraph IX (R 3) of plaintiff's complaint are by all normal standards sufficient to entitle appellant to a plenary trial.

d. Amendment VI of the U. S. constitution, which says:

> "In all criminal prosecutions, the accused shall enjoy the rights to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, whic district shall have been previously ascertained by law..."

was violated in that appellant was denied a jury trial and in that he was tried in a different district than the one in which the alleged crime was committed, and the allegations in paragraphs X and XI sufficiently allege the violation by the Oregon Supreme Court, so that it was error for the U. S. District Court to dismiss the complaint.

e. Article I, Sec. 10 of the U. S. constitution provides that:

> "No state shall...pass any bill of attainder, ex post facto law..."

and Oregon Revised Statutes 33.020(1) provides:

> ". . . it must appear that the right or remedy of a party to an action, suit or proceeding was defeated or prejudiced thereby before the contempt can be punished otherwise than by a fine not exceeding $100."

and the trial court erred in dismissing the complaint in the face of paragraph XII (R 4).

f. The Fourteenth Amendment to the U. S. constitution provides that

> "No state shall...deny to any person within its jurisdiction the equal protection of the laws"

and a reading of the complaint shows on its face that appellant was denied the equal protection of the laws.

MY DEPOSITION

The motion for summary judgment is based entirely on the pleadings, which really means my complaint, plus my deposition.

Tr page 27, line 14:

MR. CUTSFORTH: I only mention this for Mr. Lenske's clarification. We are not asserting anything that goes beyond the scope of the pleadings.

Tr page 28, line 3:

(THE COURT): But we are just going ahead on the pleading here now.

MR. CUTSFORTH: ... We are relying on the pleadings and Mr. Lenske's deposition.

WHAT IF THERE WERE NO CONVICTION?

Dep page 7, line 10:

MR. CUTSFORTH: ...If...you were suspended from the practice of law and there had been no criminal conviction, I think most people would concede that your suspension was without cause...

MR. CUTSFORTH: (Dep page 8, line 7) We are entitled to show any facts which support the propriety of the contempt proceedings, and we have to start with the initial fact of a conviction...

I believe that Mr. Cutsforth was right and that in order to obtain summary judgment or plenary judgment against me in this case it was incumbent upon the defendants in the case, appellees, to show that there was valid evidence adduced in the contempt case that I was convicted of a felony involving moral turpitude and that such conviction was a final and conclusive judgment. Appellees did not make such showing and I assert that they could not make such showing because there was no valid evidence adduced in the contempt case of conviction and because on August 28, 1967 this appellate court entered its judgment in case No. 19539 reversing the conviction that had been entered against me and which I appealed but as to which there was no evidence adduced in the contempt case.

MY DEPOSITION FORTIFIES MY COMPLAINT

Dep page 20, line 8:

Q (by MR. CUTSFORTH) You have also alleged in Paragraph IX of your complaint, sub part (c), that "it failed to produce evidence of the suspension order or service of notice of the suspension order." Whom are you referring to when you say "it?"
A The court.

Q The Oregon Supreme Court?
A Yes.

Q When you say it failed to produce the evidence, at what proceedir are you contending that evidence should have been presented or produc and was not?

A Well, it didn't at any proceeding...it didn't at any proceeding produce evidence of either the suspension order, notice of the suspens order, service of the notice of the suspension order.

Q (Dep page 21, line 21) You have alleged in sub part (f) that the Court...(line 25) That it denied you the right to present argument befo the Court or (page 22) brief relating to the findings of the referee. Wh is that contention based upon?

A Well, based upon the fact that after the referee submitted findin I requested an opportunity to present brief. I am not sure, but it seen to me I asked for an opportunity to file exceptions to the findings.

Q ...(line 9) Was there a request on your part that you be allowed to do something?

A Oh, yes; there was a definite request...(line 14) I do remember very distinctly asking in writing for an opportunity to have a hearing in objection to the findings of the referee or in reference to the (dep page 22) findings of the referee before the Supreme Court, to file brief and to have an oral hearing...

Q (dep page 26, line 4) In sub part (h) of Paragraph IX of your complaint you have alleged that the Court refused to confront plaintiff at trial or hearing when evidence was adduced or at sentencing. What are you referring to there specifically?

A The entire proceeding.

Q (line 12) My question is: Your contention here or your complaint here is based upon the fact that some or part of these proceedings wer had outside the presence of the Supreme Court?

A Yes.

Q What particular proceeding are you contending---

A All of them.

A If a jury is not -- if I am not entitled to a jury trial, I am at least entitled to confrontation by the Court at all stages.

THE COURT'S OPINION

The lower court's opinion was rendered by an able and experienced trial lawyer and judge. But emotion in judging between discredited me and the confreres of that distinguished jurist must have affected his generally perspicacious observations. Else, why would he put upon the permanent records of the law of this land (R page 62, line 19) that I was disbarred from the practice of law? That this is not true and there is nothing in the record to that effect I am sure eminent counsel for Appellees will themselves affirmatively assert in their answering brief.

Judge Kilkenny says (R 66) that he shouldn't try "to second guess a highly respectable court." The law imposes the duty upon courts to judge with absolute fairness between the highly respected and those who are disrespected. Respect is not the criterion for judging, truth is. The truth is that I was not disbarred and that the great emphasis placed by Judge Kilkenny on disbarment proceedings in his opinion shows that emotion rather than his usual sound self permeated his opinion. There are times when a Federal District Court should not try to "second guess a highly respectable court." But it should never be a rubber stamp for "a highly respectable court."

In my complaint I attack on Federal constitutional grounds the legality of contempt conviction and punishment imposed upon me by the Oregon Supreme Court. Judge Kilkenny takes as conclusive everything that court said and fails to say anything about the constitutional questions I raised. Is it or is it not a violation of due process to suspend a lawyer without notice or hearing - no matter what the cause? Is that not taking property without due process? If and when under due process a suspension order

is proper, is it due process to issue a permanent suspension order without limit as to time and thereby circumvent the due process that the United States Supreme Court demands in disbarment proceedings?

Judge Kilkenny says (R 63, line 3) "Plaintiff continued to practice law." That is what the Oregon Supreme Court said I did. But I alleged (R 3, paragraph VIII) that my conviction for contempt was bas on my making a constitutionally protected inquiry under the First Amendment to the U. S. Constitution - an inquiry that any U. S. citize could legally make. I alleged that (R 3) the Supreme Court of Oregon refused to hear me out on that or any of the other issues. Yes, I belie that on constitutional issues the Federal District Court should second guess a State court but that it should never be a rubber stamp for a sta court. And second guessing in such instances is appropriate for anoth reason. The Oregon Supreme Court was acting both as accuser and tr court. Its own dignity was involved. It was not second guessing a tria court, it was itself erring as trial courts sometimes do. Perhaps it was emotionally judging between its highly respected self and my dis-respected self - not what due process demands at all times between all disputants, even when one of the disputants is a highly respected court

It may be noted that this is the same court that, without a dissenti opinion, saw no constitutional violation in a conviction for murder whe the bailif in charge of the jury stated to one of the jurors, "Oh that wick fellow, he is guilty." See Parker v. Gladden, Warden, 385 U.S. 363, Dec. 12, 1966. Highly respected courts can be blinded to constitutional due process. Mr. Parker was entitled to be confronted by the witness against him and I was entitled to be confronted by the court that sentence me.

MY MOTION FOR DEFAULT MEETS DISASTER

On September 26, 1966 I filed a motion for default against defendants (R who had not appeared and these were the justices of the Oregon Supreme Court and the Governors of the Oregon State Bar. At the same time I submitted interrogatories to the defendants (R 10) in which I asked them when they received notice of the suit, when and through whom they received copies of the complaint. Those defendants who had not appeared generally filed a special appearance in opposition to the motion for default (R 12) on October 6, 1966. The defendants who had appeared filed objections to the interrogatories (R 16). The case had been filed on June 29, 1966 so there was an interval of about three months between the filing and the motion for default. The interrogatories sought to ascertain when and how the defendants had seen and read the complaint. What I was seeking surely was obvious to defendants and to the court. Since I got no voluntary answers to the interrogatories by any of the defendants, when the motion for default came up for hearing I subpoenaed two of the defendants who had not filed a general appearance and on December 16, 1966 the named witnesses on the Subpoena, Hon. Wm. M. McAllister and Hon. Ralph M. Holman, appearing specially, filed a motion to quash service of the subpoenas.

On December 19, 1966 Judge Kilkenny said "...I am not going to use the processes of this Court to interfere with the normal and the usual proceedings of the Supreme Court of Oregon or any other court. So the motion to quash, without hearing from you at all, Mr. Lenske, is allowed. (Tr 1-B, lines 17-22) And on page 1-C, "THE COURT: No, I am not going to hear you on this subject..." Nothing was said about the fact that if the defendants, or at least the ones who had made a general appearance, had answered the interrogatories during the preceding almost 5 months the subpoenas would not have been necessary for me to prove my point.

On pages 3 and thereafter I was given pretty rough treatment su

as: (Tr 4, line 11)

"MR. LENSKE: Well, if it please the Court, may I just finish the sentence I started to ----

you

THE COURT: Oh, I have no doubt about/finishing anything you star Mr. Lenske. You go ahead and do it.

MR. LENSKE: I see.

THE COURT: And make your record on it.

MR LENSKE: (Tr 6, line 17) Well, Your Honor, I -- my motion for default is based upon the answers which I hope to elicit, Number 1 from the interrogatories, which they have refused to answer, or their personal testimony, which, not having gotten it from the interrogatori I had hoped to get from their personal testimony.

THE COURT: I am amazed at either your ignorance, Mr. Lenske, or your statements to the Court here. You have served interrogatorie on all of the other defendants, other than those who are appearing here is that correct?

MR. LENSKE: I have served them on counsel. I have directed the interrogatories to all the defendants.

THE COURT: Have you served them on the other defendants?

MR. LENSKE: Well, I -- in person, no. I ----

THE COURT: Mr. Lenske, you can't 'oh-oh, ah-ah- me.

MR. LENSKE: No.

THE COURT: All right. That settles it then. The Motion for Defau is denied...

MR. LENSKE: (Tr 12, line 19) ...I want to show through the inter- rogatories that each of the defendants has seen and had and held and wa given a copy of the complaint in my case, in this case, and has read th relating to it in the newspapers and was aware of these promptly after t filing of the suit. And I would like -- having established that as a fact through the interrogatories, or through other means if I had to use othe means, which I didn't want to try to use the other means, I would want ruling of the Court then, not on the theory but on the facts, whether tha is sufficient notice to require them to make an appearance in the case.

THE COURT: Oh, Mr. Lenske, please don't tell me that you hones believe that.

MR. LENSKE: Well, I am seeking such a ruling, Your Honor, base as I say, on the facts, not on merely my statement that each of these de

fendants some months ago was given a copy of the complaint, read a copy of the complaint, read about the lawsuit in the newspaper and was fully aware of it. And I would like a ruling of the Court then, rather than now, whether that is sufficient requirement for them to appear.

THE COURT: Well, I will rule on it now. It is not sufficient, and further, I doubt if there is one thousandth of one per cent of the lawyers in the State of Oregon who would think that it was, so if you just want a ruling, I will rule on that now. (Tr page 13)

MR. LENSKE: (Tr page 17, line 5) Well, I want to raise a question of law based upon a set of facts, Your Honor; and I think I should have the right to do that. I ----

THE COURT: Well, you don't have the right to raise a question of law unless under the law you have that right, and I am holding that you do not have that right.

THE COURT FRUSTRATES MY EFFORTS AT PROOF

MR. LENSKE: (Tr 22, line 4) I know the answers, Your Honor; but I want to prove that by the answer ----

THE COURT: If you know the answer ----

MR. LENSKE: I want to prove it by the answers of the defendants.

THE COURT: All right. Well, you can prove it yourself if you know them. After all, nobody has better knowledge on that than you have.

THE COURT: (Tr page 23, line 10) No, we have another proceeding here, Mr. Lenske. After all, these are interrogatories, as I understand it. We have another proceeding where you can ask for admissions, and und that, you might be able to secure this information...

MR. LENSKE: I am aware of both, and I am not aware of any reason for saying, "you may not have this, because you can do it another way.

THE COURT: ...This is a matter that you know just as much about as anyone else; and if you want admissions on it, you can secure admission under the usual and customary manner.

THE EQUAL PROTECTION OF THE LAWS

MR. LENSKE: (Tr 56, line 15) I had wondered, when the Court was so concerned about the formal service not having been made upon some of the defendants in the case, whether the Court would consider it equally a violation of due process or inadequate proceedings under my allegation in the complaint that there was no legal notice of the suspension served upon me. And I would say to your Honor that there is no conclusive presumption that one looks at different litigants equally, and the principle here is exactly identical, that seven jurists with the highest standing in

the state, which I attempted to show, had full knowledge ----

THE COURT: Oh, let's not get into that, Mr. Lenske...

The court did not wish to hear further about the applicability of the principle that knowledge or hearsay information about the existence of a court proceeding must be within our concept of due process. I agree with Judge Kilkenny when he says that not more than 1 out of a thousand lawyers in Oregon would consider reading about a lawsuit in the newspaper and receiving a copy of the complai from a fellow defendant as an adequate substitute for service of summons. By the same token not more than 1 out of 1000 Oregon lawyer would consider it due process and a basis to put a man in jail for him to read in the newspaper or get a copy of a letter to a third party by the clerk of the court that he may no longer earn a livelihood throu his chosen profession. In the law what is sauce for the goose is sauc for the gander. But is that always true in the application of the law?

THE BAR COMMITTEE'S RECOMMENDATION

The 1967 Oregon State Bar Committee on Disciplinary Rules and procedure made the following report and recommendation:

DISCUSSION OF RECOMMENDATIONS

At a meeting of the Committee held May 6, 1967, the question was raised as to whether attorneys convicted of crimes should be automatically suspended by the Oregon Supreme Court before the judgment of conviction has become final. After much discussion on the point, it was unanimously agreed that the Supreme Court should not have the power to automatically suspend an attorney convicted of a crime involving moral turpitude or of a felony, until such judgment of conviction has become final.

SELECTED SUPPORTING AUTHORITIES

Cameron et al. v. Johnson, Governor, et al.

381 U.S. 741, 749 (June 7, 1965)

Justice Black, in a dissenting opinion said:

Page 749: Dombrowski also indicates to me that there might be cases in which state or federal officers, acting under color of a law which is valid, could be enjoined from engaging in unlawful conduct which deprives persons of their federally guaranteed statutory or constitutional rights.

Dombrowski v. Pfister

380 U.S. 479, 486 April 26, 1965

Opinion by Justice Brennan.

Page 486: A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms.

upon the exercise of First Amendment rights may derive
Page 487: The chilling effect/from the fact of the prosecution, unaffected by the prospects of its success or failure.

Appellants' allegations and offers of proof outline the chilling effect on free expression of prosecutions initiated and threatene in this case.

Page 489: Although the particular seizure has been quashed in the state courts, the continuing threat of prosecution portends further arrests and seizures, some of which may be upheld and all of which will cause the organization inconvenience or worse.

It follows that the District Court erred in holding that the complaint fails to allege sufficient irr parable injury to justify equitable relief.

Schlesinger v. Musmanno

367 Pa. 476 81 A 2d 316, 319 (1951)

Page 319 (81 A 2d):

' "The privilege of serving as a juror (or as here, of an attorney practicing his profession) is one of the valuable rights * * *. Such rights may neither be extinguished abated or diminished by any proceeding short of one which fully comports with the historical and constitutional requisit of due process." '

In re Schlesinger

404 Pa. 584 172 A. 2d 835, 840, 841, 848 (1961)

172 A 2d 840:

"In Schlesinger Petition, 1951, 367 Pa. 476, 481, 81 A. 2d 316 319, we had occasion to declare that the right to practice law is a right so valuable that it "'may neither be extinguished, abated nor dismissed by any proceeding short of one which fully comports with the historical and constitutional requisite of due process." '

" In In re Murchison, 1955, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942, the Supreme Court, in reversing two convictions for contempt of court, declared that "A fair trial in a fair tribunal is a basic requirement of due process.

172 A 2d 841:

"Moreover, a predilection to favor one side over the other is no required in order to vitiate a judicial proceeding as being violat of due process. Merely, "a possible temptation to the average as a judge * * * not to hold the balance nice, clear, and true" is sufficient."

Page 848:

"A disbarment proceeding is every bit as serious as a criminal trial and often far more so; the penalty of disbarment is certain harsher than a fine or short imprisonment."

A suspension without limitation amounts to the effect of receivin the punishment of disbarment without any of the safeguards provided fo disbarment proceedings.

Nathan Willner v. Committee...Div. of Supreme Ct. of N.Y.

373 U.S. 96 2 ALR3d 1254 May 13, 1963

Opinion by Mr. Justice Douglas

2 ALR 3d page 1260:

"The rules adopted by the Board provide that 'the Board may in its discretion deny admission, suspend or disbar any person.' But this must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." Id. 270 U.S. p 123, 70 L ed at 497.

Page 1261:

"Those who are brought into contest with...Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." Morgan v. U.S. 304 US 1;

10 ALR 3d 727 - 794

Page 733:

Sec. 2. Summary and comment

While there were intimations and even holdings in the earlier cases that declaratory relief, like equitable relief generally, was inappropriate where the administration of the criminal law was involved, it now seems reasonably well settled that in and otherwise proper case declaratory relief may be granted notwithstanding the fact that the declaration is as to the validity or construction of a statute having criminal or penal provisions, and it seems clear, under the modern practice in most courts, that declaratory relief will not be denied merely because the petitioner by violating the statute or ordinance in question, could have the issue of his guilt tried out in a criminal prosecution.

In Bond v. Floyd et al., 385 U.S. 116 (Dec. 5, 1966) the court sai on page 126:

> "All three members of the District Court held that the court had jurisdiction to decide the constitutionality of the House action because Bond had asserted substantial First Amendment rights."

I alleged in my complaint that my inquiry was one that any citizen had a right to make and that it was protected by the First Amendment to the U. S. Constitution. The Oregon Supreme Court concluded that such inquiry by me was practicing law. See State v. Lenske, 243 Or 477, 489. Its action was very much like that of the State of Georgia in the Bond v. Floyd case in which the court said on page 132:

> "The State declines to argue that Bond's statements would violate any law if made by a private citizen, but it does argue that even th a citizen might be protected by his First Amendment rights, the State may nonetheless apply a stricter standard to its legislators. We do not agree."

There is a direct analogy. If any citizen had the right to make the inquiry that I did then I, as a citizen, had that right. The first amendment protects everyone's right to make a simple inquiry from a state employee.

CONCLUSION

I believe that just reading my complaint should lead a fair minded person to the conclusion that it states a cause of suit on constitutional grounds. I belief that proof of my allegations will be easy.

Certificate

I certify that in connection with the preparation of this brief, I hav examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Eugene F. Lenske

APPENDIX

Following is the complaint that was filed in the U. S. District Court for the District Court on July 12, 1966 under Civ. No. 66-368. Plaintiff therein is appellant herein and defendants therein are the appellees herein.

I

Jurisdiction of this Court is invoked under the Fifth and Fourteenth Amendments to the United States Constitution and Title 42 United States Code, Sec. 1981-1988 and Title 28, Sec. 1343, and the orders and opinions against which this complaint is brought are reported in Oregon Advance Sheets, No. 7966 of September 9, 1965 and No. 8006 of November 3, 1965 and are by reference made a part of this complaint (243 Or 477).

II

That F. M. Sercombe is the Clerk and the seven persons hereinabove designated as such are the Justices of the Supreme Court of the State of Oregon.

III

That John H. Holloway is the Secretary and Lamar Tooze Jr. is the attorney in the matter hereinafter set forth and the nine persons hereinabove named are the Board of Governors of Oregon State Bar, which is a statutory creature of the State of Oregon.

IV

That at all times herein mentioned between 1925 and up to April 28, 1964 plaintiff was duly admitted to and was a practicing lawyer in the State of Oregon, with offices in Portland, Oregon.

V

That defendant Supreme Court of the State of Oregon, at the instance of defendant Oregon State Bar, acting through the individuals above named, acting ex parte and without any notice to plaintiff and without a hearing of any kind, caused an order to be entered in the records of said court suspending plaintiff from the practice of law in the State of Oregon and such ex parte order was entered in violation of plaintiff's rights under the Fifth and Fourteenth Amendments of the U. S. Constitution.

VI

That notice of said order of suspension was not served upon plaintiff.

VII

That the Supreme Court of the State of Oregon, acting at the instance of Oregon State Bar, caused plaintiff to be cited in an original proceedings in the Supreme Court of the State of Oregon for indirect contempt for alleged violation of said suspension order, although said court had no such original jurisdiction.

VIII

That said court found plaintiff guilty of contempt for exercising his freedom of speech guaranteed him by the First Amendment to the U.S. Constitution when he made an inquiry of a State of Oregon employee which could be legally and appropriately made by any citizen of the United States.

IX

That said court denied plaintiff the right of due process guaranteed under the Fifth and Fourteenth Amendments to the U. S. Constitution in

a. It directed a hearing before a Referee prejudiced against plaintiff and denied plaintiff the normal right of a citizen to cause a prejudiced Referee and prejudiced judges to be removed from consideration of his case when such prejudice was shown on the record in the manner generally followed in courts of the State of Oregon.

b. Although contempt proceedings in Oregon are quasi-criminal proceedings, it permitted discovery proceedings against plaintiff.

c. It failed to produce evidence of the suspension order or service of notice of the suspension order.

d. It failed to limit the suspension order timewise.

e. It failed to adduce evidence of intent or wilfulness.

f. It denied plaintiff the right to present argument before the court or a brief relating to the findings of the Referee.

g. It abused discretion by permitting an amendment to the initiating pleading in the nature of an indictment after trial before the referee and many months after plaintiff moved against the affidavit for insufficiency and many months after it had held the affidavit sufficient.

h. It refused to confront plaintiff at trial, or hearing when evidence was adduced or at sentencing.

X

Defendants denied plaintiff a jury trial guaranteed him both as a matter of due process and under the Sixth Amendment to the U. S. Constitution.

XI

It conducted the trial in a County and District other than where the alleged crime was alleged to have been committed, thereby violating the Sixth Amendment to the U. S. Constitution.

XII

The Supreme Court in effect issued a judicial Bill of Attainder and ex post facto law by assessing a fine greater than provided by Oregon statute, i.e., ORS 33.020, as punishment for the offense alleged.

XIII

Said acts of defendants are in violation of plaintiff's civil rights and the civil rights of all other persons within the classification of plaintiff and defendants have threatened and do now threaten to imprison plaintiff under an order entered in violation of the requirements of the laws and constitution of the United States of America and, unless restrained by this court will carry out such threat; that plaintiff has exhausted the procedural avenues of the State of Oregon to obtain relief from such threats, all to no avail and that defendants should be temporarily and permanently enjoined from issuing any process for the enforcement of said contempt order, and that because of the prejudice of defendants towards plaintiff and the other allegations herein plaintiff cannot obtain plain, speedy or adequate remedy at law in the Courts of Oregon.

Wherefore, plaintiff prays that the suspension and contempt orders of the Supreme Court of the State of Oregon against plaintiff be declared void and that defendants be restrained and enjoined from doing any act towards enforcing the same and that plaintiff be allowed his costs and disbursements incurred herein and granted such further relief as may be just and meet.

Reuben G. Lenske
Attorney pro se
1014 S.W. 2d Ave.,
Portland, Ore.

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Reuben G. LENSKE, Plaintiff,

v.

F. M. SERCOMBE, Clerk of the Supreme Court of the State of Oregon et al., Defendants.

Civ. No. 66-368.

United States District Court
D. Oregon.
March 2, 1967.
Revised Supplemental Opinion
April 17, 1967.

On defendants' motions for summary judgment, the District Court, Kilkenny, J., held that the federal court had no

> shows not only the time spent in hours but also the nature of the crime charged, the disposition of the case, the manner in which the time was spent, the necessity therefor and any other facts which tend to demonstrate 'extraordinary circumstances.' Only then can the Presiding Justice properly perform the duty imposed upon him under the statute to review such allowances." People v. Perry, supra, 278 N.Y.S.2d at 331 (App.Div., 1967).

Note

The conviction upon which the suspension and contempt were based was reversed by the Circuit Court of Appeals for the Ninth Circuit by opinion first rendered on October 5, 1966 and finalized on August 28, 1967 in case No. 19539 entitled Reuben G. Lenske v. United States of America.

jurisdiction over suit by attorney who had been suspended from practice of law by state Supreme Court to enjoin the suspension.

Motions granted and cause dismissed.

1. Attorney and Client ⇐36(1)

Under Oregon law, the Supreme Court of Oregon has exclusive jurisdiction, under its common law and statutory powers, to suspend, disbar or reprimand members of the State Bar.

2. Attorney and Client ⇐56

Board of Governors of the State Bar has limited power to recommend to Supreme Court the suspension, disbarment or reprimand of a lawyer. ORS 9.480, 33.020.

3. Injunction ⇐22

Under Oregon law, where only Supreme Court had power to suspend attorney from practice of law, issuance of injunction against clerk of Supreme Court, Secretary of State Bar, attorney for State Bar and individual members of Board of Governors of State Bar to enjoin suspension of petitioner from practice of law would be futile act. ORS 9.480, 33.020.

4. Attorney and Client ⇐57

Federal District Court does not have jurisdiction to review state court order relating to disbarment of attorney.

5. Courts ⇐282.2(9)

Supreme Court of United States will review state court order disbarring attorney where attorney makes substantial allegation that disbarment proceedings violated disbarment process or equal protection clause of the Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

6. Courts ⇐282.2(9), 397½

Limits of review by federal court of state court action in disbarment proceedings are confined to violations of due process or equal protection clauses of the Fourteenth Amendment and petition for writ of certiorari to Supreme Court of the United States is exclusive method of review. U.S.C.A.Const. Amend. 14.

7. Courts ⇐303(7)

The federal court had no jurisdiction over suit by attorney who had been suspended from practice of law by state Supreme Court to enjoin the suspension.

Revised Supplemental Opinion

8. Courts ⇐303(7)

Immunity afforded states from suit in federal court was applicable to Supreme Court of Oregon and its individual members in suit by attorney to enjoin enforcement of order suspending him from practice of law.

9. Courts ⇐284

Civil Rights Act of 1871 did not authorize attorney to proceed against individual judges of the Oregon Supreme Court in his action to enjoin enforcement of Supreme Court order suspending him from practice of law. 42 U.S.C.A. § 1983.

Reuben G. Lenske, in pro. per.

Curtis W. Cutsforth, King, Miller, Anderson, Nash & Yerke, Portland, Or., Thomas H. Tongue, Hicks, Tongue, Dale & Strader, Portland, Or., for defendants.

OPINION AND JUDGMENT

KILKENNY, District Judge:

Plaintiff charges the defendants with denying him due process of law in contravention of the Fifth and the Fourteenth Amendments in disbarring him from the practice of law and in convicting him of contempt of court. The cause is before the Court on defendants' motions for summary judgments.

Plaintiff was admitted to the practice of law in Oregon in 1925, and until 1964 was a member of the Oregon State Bar. While a member of the Oregon State Bar, he was convicted in this Court of the Federal crime of "* * * wilfully and knowingly attempting to evade and defeat a large part of income tax due and owing * * *." The Oregon State Bar filed a certified copy of the judgment of conviction with the Supreme Court of Oregon, and that Court, pursu-

ant to Rule I of its rules for admission of attorneys,[1] summarily suspended plaintiff from the practice of law in Oregon. The Oregon State Bar was notified of this suspension by letter, a copy of which was sent to plaintiff. Plaintiff continued to practice law. Later, the Oregon State Bar, as relator, commenced an original contempt proceeding in the Oregon Supreme Court, as a result of which the plaintiff was found guilty of indirect contempt and fined $500.00.[2] Plaintiff then filed a petition for writ of certiorari with the United States Supreme Court on the ground that he had been denied due process. This petition was denied. Lenske v. Oregon ex rel. Oregon State Bar, 384 U.S. 943, 86 S.Ct. 1460, 16 L.Ed.2d 541 (1966). Likewise, a petition for rehearing and reconsideration of the petition for a writ was denied, 384 U.S. 1028, 86 S.Ct. 1920, 16 L. Ed.2d 1047 (1966).

Named as defendants are the individual members of the Supreme Court of Oregon, the Clerk of the Court, the Secretary of the Oregon State Bar, the attorney for the Oregon State Bar and the individual members of the Board of Governors of the State Bar. Plaintiff's contentions of lack of due process, by the Supreme Court of Oregon, are stated in the footnote.[3] Other incidental contentions include a charge that he was entitled to a jury trial, that he was entitled to a trial in the county or the district where the alleged crime was committed, and that the Supreme Court "in effect issued a judicial bill of attainder and *ex post facto* law" by assessing a fine greater than that provided by Oregon law.[4]

Most, if not all, of the allegations against defendants are conclusions of law, or recitals, rather than statements of fact. With reference to this type of pleading, we must keep in mind that the plaintiff is a lawyer of over forty years experience and is presumed to know the ground rules of pleading and practice. Certainly, he is presumed to know the distinction between a conclusion of law and a statement of fact and the difference between an allegation of fact and one that is merely a recital. Although this case might well be decided on the total insufficiency of the complaint, I shall, nevertheless, offer my conclusions on the controlling principles as I view them.

[1–3] The Supreme Court of Oregon has exclusive jurisdiction, under its common law and statutory powers, to suspend, disbar or reprimand members of the State Bar. ORS 9.480 grants to

1. "*Rule I. Suspension after conviction of crime.* Whenever it appears to the Supreme Court that any member of the bar has been convicted of a misdemeanor involving moral turpitude or of a felony, the Court may summarily suspend such member. • • •"

2. State ex rel. Oregon State Bar v. Lenske, Or., 405 P.2d 510 (1965), 407 P.2d 250 (1965).

3. "a. It directed a hearing before a Referee prejudiced against plaintiff and denied plaintiff the normal right of a citizen to cause a prejudiced Referee and prejudiced judges to be removed from consideration of his case when such prejudice was shown on the record in the manner generally followed in courts of the State of Oregon.

"b. Although contempt proceedings in Oregon are quasi-criminal proceedings, it permitted discovery proceedings against plaintiff.

"c. It failed to produce evidence of the suspension order or service of notice of the suspension order.

"d. It failed to limit the suspension order timewise.

"e. It failed to adduce evidence of intent or wilfulness.

"f. It denied plaintiff the right to present argument before the court or a brief relating to the findings of the Referee.

"g. It abused discretion by permitting an amendment to the initiating affidavit which is the initiating pleading in the nature of an indictment after trial before the referee and many months after plaintiff moved against the affidavit for insufficiency and many months after it had held the affidavit sufficient.

"h. It refused to confront plaintiff at trial, or hearing when evidence was adduced or at sentencing."

4. ORS 33.020.

the members of the Board of Governors the limited power to recommend to the Supreme Court the suspension, disbarment or reprimand of a lawyer. Obviously, an injunction against the defendants, other than the members of the Supreme Court, would be a futile act. Clark v. State of Washington, 366 F.2d 678 (9th Cir. 1966); Hackin v. Lockwood, 361 F.2d 499 (9th Cir. 1966), cert. denied Nov. 22, 1966, 385 U.S. 960, 87 S.Ct. 396, 17 L.Ed.2d 305. Consequently, I conclude that plaintiff is entitled to no relief, injunctive or otherwise, against defendants other than the Supreme Court of Oregon and the members thereof.

[4, 5] Turning now to the relief, if any, available to plaintiff against the members of the State Supreme Court, it is generally held that the lower federal courts do not have jurisdiction to review state court orders with reference to the disbarment of attorneys. Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377, 61 L.Ed. 585 (1917); In re MacNeil, 266 F.2d 167 (1st Cir. 1959), cert. denied MacNeil v. Julian, 361 U.S. 861, 80 S.Ct. 120, 4 L.Ed.2d 103 (1959); In re Noell, 93 F.2d 5 (8th Cir. 1937); In re Bennethum, 196 F.Supp. 541 (D.Del.1961); In re Crow, 181 F.Supp. 718 (N.D.Ohio E.D.1959); Keeley v. Evans, 271 F. 520 (9th Cir. 1921), appeal dismissed 257 U.S. 667, 42 S.Ct. 184, 66 L.Ed. 426 (1921). However, the Supreme Court of the United States will review such orders where petitioner makes a substantial allegation that the disbarment proceedings violated the due process or equal protection clause of the Fourteenth Amendment. Konigsberg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); Theard v. United States, 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957); In re Patterson, 353 U.S. 952, 77 S.Ct. 869, 1 L.Ed.2d 906 (1957), 356 U.S. 947, 78 S.Ct. 795, 2 L.Ed.2d 822 (1958).

5. 366 F.

[6, 7] A thorough analysis of the Tenth Circuit cases consisting of Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962) and Howard v. United States District Court for the District of Colorado, 318 F.2d 521 (10th Cir. 1963), and the First Circuit case of In re MacNeil, supra, convinces me that the limits of review of a state court action in disbarment proceedings, are confined to violations of the due process or equal protection clauses of the Fourteenth Amendment and that a petition for writ of certiorari to the Supreme Court of the United States is the exclusive method of review. As pontificated by Chief Judge Magruder in the *MacNeil* case, "* * * even a child would wonder how the federal district court could possibly have original jurisdiction of a proceeding looking to disbarment of a lawyer from practice in the courts of the state. * * *" Those who serve on the Benches of the Federal District Courts are sufficiently busy within the confines of their own constitutional and statutory authority, without trying to second guess a highly respectable court, such as the Supreme Court of Oregon, in connection with the admission, suspension and disbarment of attorneys. Clark v. State of Washington, supra, commends the position taken by the Tenth and First Circuits,[5] and supports these views.

Defendants' motions for summary judgments should be allowed, and the cause dismissed.

It is so ordered.

REVISED SUPPLEMENTAL OPINION

[8, 9] The recent decision of the three-judge court in Campbell v. Washington State Bar Association and the Supreme Court of the State of Washington, 263 F.Supp. 991 (9th Cir. 1967), is in full support of the conclusion reached in my original opinion. The doctrine of immunity as expounded in DeLong Corp. v. Oregon State Highway Commission, 233 F.Supp. 7 (D.Or.1964), aff'd. 343 F.2d 911 (9th Cir. 1965), should shield the Courts of the respective states and the members thereof. Moreover, the plaintiff cannot proceed against the individual Judges under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Pierson, et al, v. Ray, et al, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288.